EUMIRESOURCE SDN. BHD. & ANOR.

v.

CITICORP SERVICES INCORPORATED & ANOR.

HIGH COURT, KUALA LUMPUR
DATO' SHAIK DAUD BIN HJ MOHD ISMAIL J.
[CIVIL SUIT BIL: D1-22-126-93]
7 JANUARY 1994

PRACTICE & PROCEDURE: Order 14 RHC - Claim on lost traveller's cheques - Whether there were issues to be tried - Second plaintiff purchasing traveller's cheques on behalf of first plaintiff from second defendant - Second defendant acting as first defendant's selling agent - Traveller's cheques lost - Second plaintiff making required reports - Delay of 5 $^1/_2$ years to refund - Whether delay reasonable - Cheques not encashed - Allegation of fraud - Whether allegation substantiated - Consideration of features of traveller's cheques - Whether issuing party has obligation to refund value of lost or stolen cheques - Whether negligence or fraud on part of purchaser will negate issuing party's obligation to refund - Construction of terms of purchase and refund.

The plaintiff's claim against the defendants was for the value of lost traveller's cheques which were purchased by the second plaintiff from the first defendant.

On 4 March 1988 the second plaintiff purchased traveller's cheques worth US$186,000 on behalf of the first plaintiff from the second defendant who, as the first defendant's selling agent, issued 372 Citicorp traveller's cheques in favour of the second plaintiff. The second plaintiff was advised by an officer of the second defendant that in the event of loss or theft to report the theft to the nearest police station and the nearest Citicorp traveller's cheques pre-authorised refund center. Brochures on Citicorp traveller's cheques handed to the second plaintiff represented *inter alia* that their cheques were as good as cash especially when lost. The second plaintiff realised all 372 Citicorp traveller's cheques were missing on 5 March 1988 and immediately lodged a police report and informed the second defendant, as one of the pre-authorised refund centers. The first plaintiff completed a special application form for refund at the request of the second defendant on 8 March 1988. Thereafter nothing was heard from the second defendant. The first plaintiff made several enquiries and on 15 March 1988 the first defendant replied that the first plaintiff's claim for refund could not be met as investigations were pending. For 5 $^1/_2$ years to date the defendants failed to make the refund. None of the cheques had been cashed nor was an attempt made to do so. The second defendant in its defence assumed no responsibilities towards the issuance whereas the first defendant averred that a refund would not be made if there was suspicion of fraud.

Held:

[1] It was most unreasonable and mind boggling that for 5 $^1/_2$ years to date the defendants had failed and neglected to refund the said sum. The Court was of the view that however global their network 5 $^1/_2$ years was long enough to complete their investigations.

[2] No evidence had been adduced of the so called suspicion of fraud other than averments that the first defendant "suspected" that the cheques were still with the second plaintiff and that the police report was a sham. If the police report was a sham no police action had been taken nor had the defendants filed a police report to counter the second plaintiff's report. Even if true the first defendant with their global network could have stopped payments on those cheques and reported any attempt to encash them. In the circumstances the first defendant's defence was vague.

[3] Traveller's cheques are in fact a conditional order in that it can only be cashed if the purchaser countersigns it at the point of making a purchase otherwise it is of no value. There are some features of traveller's cheques which are important to note. Firstly, it provides security for a traveller. Secondly, the issuing party has the traveller's money as these cheques have to be purchased by the traveller. Thirdly, the issuing party almost always insists on a prompt report of any loss of the cheques. If this is done then the issuing party would be aware that any counter signature on the cheques is a forgery.

[4] Where the contract of purchase of traveller's cheques contains express provision for a refund, unless the purchaser breaks any of his obligations, he is entitled to be refunded. Where there is no express provision for a refund there would, of necessity, be an implied obligation to refund subject to a discretion to resist a refund.

[5] On the Court's perusal of the terms of the purchase and refund and the representation contained in the 1st defendant's brochures it was clear that there was an express obligation on the part of the defendants to refund, more so in this case as the lost cheques had not been encashed anywhere nor had there been any attempts made to encash them. There was also no evidence of negligence or fraud on the part of the second plaintiff and he was entitled to a refund. No issues for trial serious or otherwise had been established.

[Final judgment for the plaintiffs as prayed].

Cases referred to:
Elawadi v. Bank of Credit and Commerce International S.A. [1989] 1 All ER 242 ***(foll)***
Fellus v. National Westminster Bank [1983] 133 NLJ ***(foll)***

Legislation referred to:
Rules of the High Court 1980, O. 14

For the plaintiff - M. Pathmanathan; M/s. Yusuf Lee Pathma & Marbeck
For the 1st defendant - Meera Samanthar, M/s. Shearn Delamore & Co.
For the 2nd defendant - M.K. Yap; M/s. Shearn Delamore & Co.

JUDGMENT

Shaik Daud bin Hj Mohd Ismail J:
The plaintiffs claim against the defendants is for the value of lost travellers cheques which were purchased by the second plaintiff from the first defendant. Plaintiffs now apply for a final judgement under O.14 Rules of the High Court 1980. It is contended by learned Counsel for the plaintiffs that this is a straight forward case and that there are no serious issues to be tried and therefore a fit and proper case for an O. 14 judgement. Naturally learned Counsel for the defendants think otherwise.

The facts of the case are not much in dispute. On 4 March 1988 second plaintiff went to the second defendant's bank i.e. the Mui Bank Berhad with the purpose of purchasing travellers cheques to the value of US$186,000 on behalf of first plaintiff as travellers' cheques could only be purchased by individuals, second defendant as the first defendant's selling agent issued 372 Citicorp travellers cheques in US$500 denominations in favour of the second plaintiffs totalling US$186,000. The purpose of this was for second plaintiff to purchase some machinery in Taipeh for first plaintiff. This is not denied by the defendants. According to second plaintiff the first plaintiff provided the funds for the purchase after being duly authorised by a resolution of the Board of Directors of first plaintiff. Incidentally second plaintiff and his wife are the sole shareholders directors of first plaintiff. As is the normal practice second plaintiff had to sign the travellers cheques on the upper left corner of each cheque in the presence of an officer of second defendant and second plaintiff is required to sign on the lower left corner only when negotiating the said cheques. Second plaintiff was adviced by the officer of the second defendant that in the event of loss or theft, the second plaintiff is to report the theft to the nearest police station and to the nearest Citicorp travellers'cheques pre-authorised refund center. Second plaintiff was also given brochures on Citicorp Travellers Cheques which clearly represented *inter alia:*

> *Our Global Refund System*
>
> Citicorp Travellers Cheques are as good as cash until you lose them - then they're better. Because Citicorp's refund system offers tens of thousands of refund locations worldwide to assist you in getting a faster refund in case of thefts or loss.

From the above I can see no better assurance that can be given to purchasers of Citicorp Travellers Cheques.

On the following day 5 March 1988 second plaintiff realised that all the 372 Citicorp Travellers Cheques which he purchased the previous day went missing. Second plaintiff quickly lodged a police report on the same day and informed second defendant as one of the authorised refund centers and confirmed the loss by a letter dated 7 March 1988. The next day 8 March 1988 at the request of second defendant first plaintiff completed a special application form for a refund. Thereafter nothing was heard from 2nd defendant. First plaintiff made several telephone calls and even wrote a letter on 10 March 1988 detailing the events of what transpired. Incidentally as a result of the loss first plaintiff had to postpone his business trip overseas for which purpose he purchased the travellers cheques. By a letter dated 15 March 1988 first defendant replied with a short letter saying that first plaintiff's claim for refund could not be met as investigations were then pending. I suppose

this letter of 15 March 1988 is quite understandable inspite of the second defendant's assurance of quick refund, since a large sum of money is involved, and I am sure any person would reasonably expect it. Now however,I find it most unreasonable and mind boggling that $5^1/_2$ years later todate the defendants have failed and neglected to refund the said sum or for that matter at all. Surely however global their network is $5^1/_2$ years is long enough to complete their investigations.Furthermore, $5^1/_2$ years have passed and none of the travellers cheques had been cashed or even an attempt made to do so. The question is how long must a *bona fide* purchaser of travellers cheques wait for refund of lost cheques?

The second defendant in their statement of defence while admitting selling the travellers cheques to the second plaintiff avers that they are only the authorised selling agent of first defendant and assumes no responsibilities towards the issuance. The first defendant again while admitting the purchase avers that a refund will not be made if there is suspicion of a fraud. No evidence has been adduced of this so called suspicion other than averments that the first defendant "suspects" that the cheques are still with the second plaintiffs and that the police report is a sham report. Nothing has been produced to substantiate these allegations. If the police report is a sham no police action had been taken nor has the defendants filed a counter police report. Even if true surely first defendant with their global network can stop payments on those cheques and report any attempt to encash them? In the circumstances I find it rather strange that the first defendant has put up such a vague defence. To follow their logic the cheques can never be encashed at all and no refunds will be made forever. What then has happened to their shouts of their cheques being better than cash inspite of their admittinq this in their defence.

There is no need for me to go into the law governing travellers cheques as it is now widely known the purpose and value of them. It is in fact a conditional order in that it can only be cashed if the purchaser countersigned it at the point of making a purchase otherwise it would be of no value. There are some features of travellers cheques which seems to be important to note. Firstly it provides security for a traveller. Secondly the issuing party has had the travellers money, as these cheques has to be purchased by the traveller. Thirdly the issuing party almost always insist on prompt report of any loss of the cheques. If this is done then the issuing party would be aware that any counter signature on the cheques is a forgery. It seems clear therefore that in these circumstances it would be quite safe to imply an obligation of some sort on the part of the issuing party to refund the value of the lost or stolen cheques. Apart from this implied term the issuing party in this case as in all other cases expressly contracted to refund in case of the cheques being lost or stolen. In this case, however, the first defendant went one step further by expressly stating in their brochures that their cheques are better than cash especially when the cheques are lost. There are in fact no specific legislation governing travellers cheques in Malaysia however there are some English cases on them.

In *Elawadi v. Bank of Credit and Commerce International S.A.* [1989] 1 All ER 242 the plaintiff purchased £50,000 worth of travellers cheques from the defendant bank. The agreement covering the purchase contained a clause on refunds in case of loss or the cheques being stolen. It provides that 'any claim for a refund of a lost or stolen cheque shall be subject to approval by the issuer and to presentation to the issuer of the purchaser's copy of this agreement'. A few days later the cheques were stolen from the plaintiff's car, largely as a result of his own negligence and £40,700 worth of the stolen cheques were encashed. The bank refused to refund the plaintiff the full value of the stolen cheques but agreed only to refund a sum of £9,300 in respect of those cheques which had not been encashed. The plaintiff sued the bank for refund of the whole £40,700. Hutchingson J held that:

> Where a contract for the sale and purchase of traveller's cheques contained an express term obliging the issuing bank to refund the value of lost or stolen cheques, that obligation was subject to a discretion not to pay where the purchaser had broken one of his contractual obligations, but it was not (in the absence of any express provision) subject to an implied term precluding recovery by the purchaser where the loss resulted from his own negligence or recklessness. Where the contract contained no express term obliging the bank to refund the value of lost or stolen cheques there would, of necessity, be an implied obligation to refund but subject to a discretionary right to resist a refund.

The Court went on to find that on the true construction of the contract entered into between the plaintiff and the defendant it contained an express obligation on the part of the defendant to refund lost or stolen cheques regardless of the plaintiff's own negligence or recklessness in safeguarding the cheques and ordered the defendant to pay the £40,700 as claimed.

In Fellus v. National Westminster Bank [1983] 133 NLJ the plaintiff purhased £800 worth of traveller's cheques. The terms governing the purchase stated that any loss of cheques should be reported to the police and the nearest bank and that 'a refund will be made upon completion of our form of application, providing the cheques were signed but not contersigned and there had been no undue negligence'. The plaintiff did sign the cheques at the time of purchase. A short while later the plaintiff discovered the cheques were missing. He duly reported the loss to the police and the bank. He then claimed for a refund from the bank. The court found no undue negligence on the plaintiff's part and held that the plaintiff was entitled to a refund.

From these two cases it seems clear to me that where the contract of purchase of travellers cheques contains express provision for refund unless the purchaser breaks any of his obligation, he is entitled to be refunded. Where there is no express provision for a refund there would, of necessity, be an implied obligation to refund subject to a discretion to resist a refund.

In the present case on my perusal of the terms and conditions of the purchase and the terms of refunds it seems undoubtedly clear to me that there is an express obligation on the part of the defendant to refund, more so in this case as the lost cheques had not been encashed anywhere nor any attempts made to encash them. On the true construction of the terms of purchase and refund in the present case I hold that there being no evidence of negligence or fraud on the part of the plaintiff he is entitled to a refund. I find that the defence put up has no merits whatsoever and no issues for trial serious or otherwise have been established. Therefore a final judgment is entered for plaintiff as prayed.

KASSIM BIN SULONG & ANOR. AS THE LIQUIDATORS OF 10 COMPANIES

v.

GUTHRIE ESTATES HOLDINGS LTD. & 8 ORS.

HIGH COURT, KUALA LUMPUR
DATO' DR. ZAKARIA BIN MOHD YATIM J.
[ORIGINATING SUMMONS NO. D4-24-262-89]
28 JANUARY 1993

PRACTICE & PROCEDURE: Application to strike out paragraphs in affidavit - Application to strike out exhibits annexed to affidavit - Whether said paragraphs and exhibits scandalous, irrelevant, inadmissible or otherwise oppresive - Application made under O. 41 r. 6 Rules of the High Court 1980 and under inherent jurisdiction of the Court.

The first, eighth and ninth respondents (the applicants) applied for an order that paragraphs 16-18, 21-32, 34-35 and 37-41 of the affidavit of one Lee Chen Wa be struck out and that all the exhibits, bar one, to the said affidavit also be struck out on the grounds that the said paragraphs and exhibits to the said affidavit are scandalous, irrelevant, inadmissible or otherwise oppresive. At the hearing the respondents found paragraph 16 of the affidavit unobjectionable and did not proceed against the said paragraph.

Held:

[1] The whole of the said affidavit should be struck out because the deponent had produced heresay evidence. The deponent had not disclosed the source of the information deposed to in his affidavit and as such the said affidavit did not comply with the requirements of O. 41 r. 5 of the Rules of the High Court 1980 (RHC 1980).

[2] In any event, looking at the paragraphs objected to, paragraph 17 referred to events subsequent to the agreement and it being settled law that a contract could not be construed by reference to the subsequent conduct of the parties, paragraph 17 of the affidavit should be disregarded. When the deponent said in paragraph 18 of the affidavit that he was "advised and verily believed", he had not disclosed the source of his information or the persons who advised him and therefore the averment in paragraph 18 is bad as paragraph 18 contains heresay evidence. Since heresay evidence is